COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 79 of 2022

IN THE MATTER OF ALL THOSE pieces parcels or lots of land situate at "Signal Point" also known as "Summer Point" on the Island of Rum Cay one of the Islands of the Commonwealth of The Bahamas and designated Lots 2, 3, 5, 9, and 10

AND IN THE MATTER of the Quieting Titles Act, 1959

AND IN THE MATTER of the Petition of Scott E. Findeisen and Brandon S. Findeisen (as Trustees of the Stephen A. Orlando Revocable Trust)

B E T W E E N

THE MINISTER RESPONSIBLE FOR CROWN LANDS
Appellant

AND

SCOTT FINDEISEN & BRANDON FINDEISEN
(as Trustees of the Stephen A. Orlando Recoverable Trust)
Petitioners/Respondents

BEFORE: **The Honourable Sir Michael Barnett, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane-Scott, JA

APPEARANCES: **Ms. Kenria Smith for the Appellant**
Mr. Timothy Eneas, KC with Mr. Richard Lightbourn for the Petitioners/Respondents

DATES: **26 October 2022; 27 October 2022; 16 November 2022**

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Quieting Titles Appeal - Quieting Petition - Quieting Titles Act, 1959, sections 3 and 7 - Quieting Titles Rules, rule 5 - Certificate of Title - Adverse Claim - Crown Grant - Commutation - Locus Standi - Appellate Court Interference with Trial Judge's Finding of Fact - Accretion of Land - Parens Patriae

The Petitioners/Respondents filed a Quieting Petition in the Supreme Court, seeking an investigation into their title of “all those pieces, parcels or lots of land situate at “Signal Point” also known as “Sumner Point” on Rum Cay designated Lots 2, 3, 5, 9 and 10. The Petitioners/Respondents claimed a documentary title via a Crown Grant and a possessory title via

exclusive possession of the property. Two adverse claims were filed: one by the Appellant and a second by another adverse claimant, the latter of which was dismissed.

The judge held that on the balance of probabilities that the Petitioners/Respondents were the documentary owners of the portion of the land designated as Parcel A and that there was no claimant with a better documentary title; the judge did not accept the claim by the Minister that the property acquired by the Petitioners/Respondents was to the south of Parcel A. Regarding a portion of the land referred to as Parcel B, the Appellant claimed that it was not a part of the Crown Grant to the Petitioners/Respondents. The Appellant further claimed that Parcel B was formed by man-made accretion and, as such, belonged to the Crown. The judge found that the Petitioners/Respondents were in exclusive possession of the land for more than 100 years. After considering the evidence of various land surveyors, the judge also found that the land on Parcel B was accreted land by natural accretion and did not belong to the Crown. The judge further held that the accreted land belonged to the Petitioners/Respondents, who were the owners of the adjacent Parcel A. Accordingly, the judge granted the Certificate of Title for all five lots to the Petitioners/Respondents.

The Appellant has appealed the judge's decision.

Held: appeal dismissed. The Appellant has no locus standi to appeal the grant of a certificate of title to which the Appellant does not claim any title. The Quieting Titles Act, 1959 ("the Act") and the Quieting Titles Rules ("the Rules") do not contemplate that a person who has no claim to property which is the subject of a quieting action has any standing to file an adverse claim or participate in any manner in the quieting action. Further, there is no requirement in the Act or the Rules that notice of a petition must be served on the Crown. As the Appellant has no claim to the land in Parcel A which is a part of the Crown Grant to the Applicants/Respondents, the Appellant has no standing to appeal the grant of a Certificate of Title to lots which fall into Parcel A.

Whether land is accreted land is a question of fact; to whom the accreted land belongs is a question of law. An appellate court should be reluctant to interfere with a trial judge's primary finding of facts, unless the finding of facts are completely unreasonable. Even with respect to questions of fact surrounding expert evidence, it is within the trial judge's province to decide what conclusions to draw, even if the evidence is uncontroverted. Thus, the judge was entitled to weigh the differing expert evidence of various land surveyors and conclude that Parcel B was accreted land formed by natural accretion. This Court cannot say that the finding of the judge that the land in Parcel B was accreted land formed by natural accretion was plainly wrong; as such, this Court will not interfere with the judge's finding of fact.

Finally, there is no basis for setting aside the judge's findings of fact on the possession of the Petitioners/Respondents and their predecessors in title. Whilst a commutation may or may not be a good root of title, a commutation is cogent evidence that the person was in possession of the land the subject of the commutation.

Armbrister v Lightbourn [2012] UKPC 40; mentioned

Bahamasair Holdings Limited v Messier Dowty Inc [2018] UKPC 25; applied

Bannerman Town, Millars and John Millars Association v Eleuthera Properties Ltd [2018] UKPC 27; mentioned
Beulah Rahming v The Mailboat Company Limited SCCivApp & CAIS No. 54 of 2015; applied
Grand Bahama Development Co v Attorney General [1986] BHS J No 125; considered
Timothy Cox Estates Ltd. v. Harris [1982] BHS J. No. 35; considered
Volpi and another v Volpi [2022] EWCA Civ 464; applied

JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. This is an appeal by the Minister Responsible for Crown Lands ("Minister") against a judgment in a quieting action. The Minister appeals the decision of Charles J ("the judge") to accede to a petition by the Petitioners/Respondents, Scott Findeisen and Brandon Findeisen for the grant of a Certificate of Title to certain parcels of lands in Rum Cay.

2. Rum Cay is situated in the south east of the archipelago. In area, it is less than half of the size of New Providence and has a population of less than 100 persons.

3. By a petition dated 23 November 2016, the Petitioners/Respondents sought an investigation into their title of "all those pieces, parcels or lots of land situate at "Signal Point" also known as "Sumner Point" on Rum Cay designated Lots 2, 3, 5, 9 and 10. The Petitioners/Respondents claimed a documentary and possessory title to the property.

4. By their Abstract of Title the Petitioners/Respondents claimed a documentary title by virtue of their being the successors in title to William Sumner ("Sumner") to whom a Crown Grant was given on the 11 December 1806 and by virtue of a conveyance dated 19 June 1860 from the Provost Marshall to Rachel Sumner, the widow of William Sumner and the subsequent conveyances from Rachel Sumner to Lennox Forsyth beginning 11 July 1860.

5. The Petitioners/Respondents also claim that they and their predecessors in title have been in exclusive possession of the property since 1847.

6. At the time of the trial the Minister and an entity known as Wahoo Foundation were the only adverse claimants. However, Wahoo Foundation's claim was dismissed on the basis that it was simply a licensee of the Crown and could claim no greater interest than the Crown. This effectively left the Minister as the only adverse claimant.

7. In its adverse claim, the Minister said:

> **"Take notice that the PRIME MINISTER of the Commonwealth of the Bahamas as a MINISTER RESPONSIBLE [*sic*] CROWN LANDS claims to be beneficial owner to the fee simple to all that piece parcel or lot of land the**

subject matter of this said Petition by virtue of documentary and possessory title.
The Survey Plan in the Department of Lands and Surveys clearly shows that the subject property is identified as Crown Land.
Therefore the petitioner cannot claim to be in exclusive possession of the same for at least 60 years in order to dispossess the Crown."

8. This adverse claim claimed the entirety of the lots the subject of the petition including the lots on Parcel A, which was the subject of the Crown Grant. It was not limited to that part of the lots situated on Parcel B, the disputed accreted land.

9. As to Parcel B, the Minister's position was that the land in question was not part of the 1806 Grant to Sumner. It was either Crown land at the time of the 1806 Grant or that it was land which had accreted over the years and which belonged to the Crown. The Minister's position was summarized by the trial judge in paragraph 130 of her judgment:

> "**…the Crown argued that the Petitioners have failed to establish, on a balance of probabilities, that Parcel B was formed by natural accretion. Instead, the Crown alleged that if there were accretion, it was man-made from the excavation of the pond.**"

10. The judge conducted an investigation and acceded to the petition. The judge found that the Petitioners/Respondents were in exclusive possession of the land for more than 100 years.

11. The judge also held that on the balance of probabilities, the Petitioners/Respondents were the documentary owners of the land on Parcel A and that there was no one with a better documentary title. The judge did not accept the claim by the Minister that the property acquired by the Petitioners/Respondents was to the south of Parcel A.

12. The judge also held that the land on Parcel B was accreted land by natural accretion and was not man-made accretion. The judge further held that the accreted land belonged to the owners of the adjacent Parcel A and not to the Crown. In the result, the judge granted the Certificate of Title to the Petitioners/Respondents for all five lots.

13. The Minister has appealed that decision.

14. The grounds of appeal are as follows:

> "**1. The learned judge erred and misdirected herself in fact and in law when she found that William Sumner and his successors established factual possession and the necessary intention to possess the subject land.**
> **2. The learned judge erred in fact and in law in finding that the William Sumner Grant was the same property described in the Petitioners' conveyances. That her Ruling goes against the weight of the evidence presented, and that she failed to properly consider the evidence as it relates to the position of the land and the description of the land in the Petitioner's conveyances.**

3. The learned judge erred in fact and in law when she failed to consider that the Appellant was in possession of the 15 acre tract and remained in possession by virtue of its documentary title and by the use and occupation of its licensee, the Wahoo Resort Foundation.

4. The judge erred in fact and in law in finding that the 15 acres tract of land was accreted land.

5. The learned judge erred and misdirected herself in fact and law in failing to apply the relevant limitation period for adverse possession of 60 years for lots which sit on the 15 acres tract of land.

6. The learned judge erred in law in finding that a good root of title need not be deduced in a Quieting Petition action, and has misdirected herself as to the Conveyancing and Law of Property Act ("the CLPA") that a good root of title begins with a Grant, a Lease by the Crown or a Certificate of Title.

7. The learned judge erred and misdirected herself in law in finding that estoppel applied.

8. The learned judge made findings of fact not supported by evidence, and failed to consider or give sufficient weight to relevant evidence. She ought to have dismissed the Petition and to have awarded costs to the Appellant."

15. In my judgment, the threshold question is whether the Minister has the standing to appeal the grant of a certificate of title to the Petitioners/Respondents to the lots on Parcel A to which the Minister himself does not claim any title. In my judgment, the answer is no.

16. The nature of actions under the Quieting Titles Act, 1959 ("the Act") has been the subject of analysis by the courts on many occasions. I need only refer to two recent decisions of the Privy Council in **Armbrister v Lightbourn** [2012] UKPC 40 and **Bannerman Town, Millars and John Millars Association v Eleuthera Properties Ltd** [2018] UKPC 27. The judge referred to those decisions in her judgment and there is no need to repeat them.

17. Section 3 of the Act provides:

"**3. Any person who claims to have any estate or interest in land may apply to the court to have his title to such land investigated and the nature and extent thereof determined and declared in a certificate of title to be granted by the court in accordance with the provisions of this Act.**"

18. Section 7 of the Act provides:

"**7. (1) Where it appears that there is or may be any person, known or unknown, who may have dower or a right to dower or <u>a claim adverse to or inconsistent with that of the petitioner in to or in respect of the whole or any part of the land mentioned in the petition,</u> the court shall direct a notice to be sent by registered post to or to be served personally on that person, his attorney or agent or to be published in such newspaper or newspapers published either within or without The Bahamas, or both, or to be served in such manner as the court may in any particular case decide. Such notice shall**

be in such form and shall contain such particulars as shall be prescribed by the rules and shall state the time within which any adverse claims must be filed.
(2) Any person having dower or a right to dower or an adverse claim or a claim not recognised in the petition shall before the expiration of the times fixed respectively in the notices referred to in subsection (1) of section 6 of this Act or subsection (1) of this section for the filing of adverse claims, file and serve on the petitioner, or his attorney, a statement of his claim in Form 3 of the Schedule, verified by an affidavit to be filed therewith. The failure of any such person to file and serve a statement of his claim within the time fixed by the respective notices aforesaid shall operate as a bar to such claim." (Emphasis added)

19. Rule 5 of the Quieting Titles Rules ("the Rules") provide:

"**5. Whenever a person files an adverse claim under the Act he shall also file and serve on the petitioner or his attorney an abstract of title to the land which he is claiming and a proper plan thereof:**
Provided that if the adverse claimant is claiming the entire land claimed by the petitioner it shall be sufficient for him to say so in his abstract of the title without filing such plan." (Emphasis added)

20. The petition sought an investigation as to the Petitioners/Respondents' right to land specified in the petition. The Act and the Rules essentially provide that a person who has a claim to the property or part of the property being investigated which is inconsistent with the claim of the petitioner shall be entitled to have his right to that property or part thereof investigated by the Court.

21. However, the Act and the Rules do not contemplate that a person who has no claim to property which is the subject of a quieting action has any standing to file an adverse claim or participate in any manner in the quieting action. The Act does not permit a person who has or makes no claim to property to challenge a right of a petitioner to have his interest investigated and determined by the Court. In short, he does not have the right to say "I do not have any claim to the property but you (i.e. the court) should not grant any certificate to a petitioner because he does not have any claim either."

22. As the judge outlined in the opening paragraph of her judgment:

"**This is a Quieting Petition made pursuant to section 3 of the Quieting Titles Act 1959, Ch. 393 ("the QTA"). It concerns 5 lots of land designated lots 2, 3, 5, 9 and 10 on the Island of Rum Cay. Portions of lots 5, 9 and 10 are situate on an 80 acre parcel which was granted to William Sumner by Crown Grant in 1806 ("Parcel A") with the remaining parts of those lots together with lots 2 and 3 being situate on an adjoining 15 acre tract ("Parcel B") (together "the Lots" or "the property"). The Crown does not dispute the Petitioners' claim**

<u>to the portions of the property situate on Parcel A</u> but disputes the Petitioners' claims insofar as they relate to the portions of the property situate on Parcel B." (Emphasis added)

23. At the trial of the petition, the Minister, as an adverse claimant, made no claim to Parcel A. The Minister conceded that Parcel A was part of the Sumner Grant and therefore made no claim to that property. The Minister's position was that the property on Parcel A was not in fact or law owned by the Petitioners. Rather, the Minister's position was that the property owned by the Petitioners/Respondents was to the south of Parcel A and B. In those circumstances, the Minister asserted that the judge should not have granted a Certificate of Title to the lots on Parcel A and should have dismissed that part of the petition.

24. However, the Minister was not in fact claiming nor could he claim any title to the land which the Crown had conveyed to Sumner by the 1806 Crown Grant. The Crown had conveyed it out and the Abstract of Title filed by the Minister did not suggest any method by which the title to the land granted to Sumner came back to the Crown.

25. As pointed out earlier, the judge stated, "*The Crown does not dispute the Petitioners claim to the portions of the property situate in Parcel A*". At the beginning of the appeal, the Crown confirmed the position in the following exchange:

> **"THE PRESIDENT: When you make an adverse claim, as I understand it, you are claiming a title to that land that is adverse to that of the petitioner.**
> **MS. SMITH: Yes.**
> **THE PRESIDENT: There are three parcels of land that are the subject of a Crown Grant to Sumner. On the face of it, I would have thought that you were not making a claim to that land or you cannot make a claim to that land as an adverse claimant, because you acknowledge that you showed it or you conveyed it or you granted it to someone else.**
> **MS. SMITH: Yes, granted.**
> **THE PRESIDENT: So you cannot -- I was trying to figure out the basis upon which you, as the Crown, can lay claim to those three parcels of land.**
> **MS. SMITH: The three parcels on the William Sumner Grant, we are not laying claim to those three.**
> **THE PRESIDENT: So you are really only laying claim to that portion of the land which the judge found to have been accretion --**
> **MS. SMITH: Yes.**
> **THE PRESIDENT: -- as part of the land?**
> **MS. SMITH: Yes.**
> **THE PRESIDENT: That is your claim. Your claim is limited to whether or not the judge was right or wrong to find that the two parcels became part of the Sumner Grant by way of accretion.**
> **MS. SMITH: Yes, by way of accretion."**

26. In my judgment, as the Minister has no claim to that part of the land in Parcel A which is part of the Crown Grant to Sumner, it does not have the standing to appeal the grant of a Certificate of Title to those lots which fall within Parcel A.

27. The Minister does not assert that he has standing as "parens patriae" to challenge the grant of a Certificate of Title to a person who he claims has no title to land. A review of actions under the Act does not disclose that the Crown has ever asserted such a claim as 'parens patriae' to oppose the grant of a certificate of title to a petitioner. It is to be noted that there is no requirement in the Act or the Rules that notice of a petition must be served on the Crown.

28. In my judgment, to the extent that this appeal by the Minister seeks to set aside the Certificate of Title to those lots in Parcel A, the appeal must be dismissed.

29. Next, I turn to that part of the appeal which challenges the grant of a Certificate of Title to the lots on Parcel B, involving the issue of the accreted land. In doing so, I remind myself that this is an appellate court and not a trial court.

30. Whether the land is accreted land is a question of fact; to whom the accreted land belongs is a question of law.

31. The law with respect to ownership of accreted land is not in dispute. In her judgment, the judge referred to **Halsbury's Laws of England**, 5th ed., Volume 100 at page 61. The law was also summarized by Gonsalves-Sabola J (as he then was) in **Grand Bahama Development Co v Attorney General** [1986] BHS J No 125. At paragraph 2 of that case he stated that:

> **"2. It is common ground between the parties that there has been land formation to the south of the original high water mark pushing the high water mark further southwards. The ownership of the new land, referred to as "the accreted land," became a bone of contention between the plaintiffs and the Crown an [sic] represented by the Attorney General of the Commonwealth. The plaintiffs assert that by operation of law the ownership of "the accreted land" lies in the original owners of the land contiguous to high water mark. The plaintiffs say that the new land was the result of gradual and imperceptible accretion over a period of years. The defendant, on the other hand, claims the land for the Crown, again by operation of law. The defendant asserts that the new land was the product of reclamation and not natural accretion."**

Gonsalves-Sabola J reviewed the law on accretion and said:

> **"10. Lord Wilberforce, speaking for the Board of the Judicial Committee of the Privy Council in the case of the Southern Centre of Theosophy Incorporated v. State of South Australia (1982) A.C. 706 at 716, said that the authorities on the doctrine of accretion were "copious and in their result clear" and proceeded to restate the doctrine, condensing it consistently with**

the authorities hereinbefore cited. I extract from those authorities the following propositions which are framed to bear directly on the issues to be resolved in this case.

(1) The owners in fee simple of the Xanadu Beach Hotel property would become the owners of any alluvial land added thereto by the action of the sea if such addition came about by gradual and imperceptible accretion.

(2) The fact that such accretion may have been assisted by the breakwaters built by the owners of the said property for the entirely different purpose of eliminating navigational hazards due to erosion from the Marina basin and its channel to the sea would not exclude the operation of the doctrine of accretion in favour of the owners.

(3) The doctrine would be excluded if the accretion to the property was the result of actual reclamatory works done by the owners.

(4) If the accretion was the result of reclamation the title in the accreted land is in the Crown."

32. As the Minister's grounds of appeal contains a number of claims that the Judge "erred in fact", it is necessary to begin by setting out the role of an appellate court in considering challenges to findings of fact made by a trial judge. The role of an appellate court in this regard was summarized by the Privy Council in **Bahamasair Holdings Limited v Messier Dowty Inc** [2018] UKPC 25:

> **"36. …1. "… [A]ny appeal court must be <u>extremely cautious about upsetting a conclusion of primary fact.</u> Very <u>careful consideration must be given to the weight to be attached to the judge's findings</u> and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere …" - Central Bank of Ecuador v Conticorp SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.**
>
> **2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - Anderson v City of Bessemer, cited by Lord Reed in para 3 of McGraddie.**
>
> **3. The principles of restraint "do not mean that the appellate court is never justified, indeed required, to intervene." The principles rest on the assumption that "the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities." Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of Central Bank of Ecuador."** (Emphasis added)

33. Further, as Conteh JA said in **Beulah Rahming v The Mailboat Company Limited** SCCivApp & CAIS No. 54 of 2015,

"...as an appellate Court, we do not easily or readily interfere with the findings of facts of a trial judge, unless he went plainly wrong or arrived at a conclusion not warranted by the facts and applicable law."

34. Finally, the recent decision of the English Court of Appeal in **Volpi and another v Volpi** [2022] EWCA Civ 464, makes it clear that an appellate court should not interfere with a trial judge's finding of facts, unless the finding of facts are completely unreasonable. That Court further held that particularly with respect to questions of fact surrounding expert evidence, it was entirely within the trial judge's province to decide what conclusions to draw, even in a case where the evidence was uncontroverted. The relevant principles are stated in paragraphs 2 to 5 of that judgment:

"2 The appeal is therefore an appeal on a pure question of fact. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
(vi) Reasons for judgment will always be capable of having been [sic] better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.
3 If authority for all these propositions is needed, it may be found in Piglowska v Piglowski[1999] 1 WLR 1360; McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477, Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600, Glencore Services (UK) Ltd v Elliston [2016] EWCA Civ 407, JSC BTA Bank v Ablyazov [2018] EWCA Civ 1176; [2019] BCC 96,

ACLBDD Holdings Ltd v Staechelin [2019] EWCA Civ 817; [2019] 3 All ER 429 and Perry v Raleys Solicitors [2019] UKSC 5; [2020] AC 352.
4 Similar caution applies to appeals against a trial judge's evaluation of expert evidence: Byers v Saudi National Bank [2022] EWCA Civ 43; [2022] 4 WLR 22. It is also pertinent to recall that where facts are disputed it is for the judge, not the expert, to decide those facts. Even where expert evidence is uncontroverted, a trial judge is not bound to accept it: see, most recently, Griffiths v TUI (UK) Ltd [2021] EWCA Civ 1442; [2022] 1 WLR 973 (although the court was divided over whether it was necessary to cross-examine an expert before challenging their evidence). In a handwriting case, for example, where the issue is whether a party signed a document a judge may prefer the evidence of a witness to the opinion of a handwriting expert based on stylistic comparisons: Kingley Developments Ltd v Brudenell [2016] EWCA Civ 980.
5 Tribunals are free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Whether any positive significance should be attached to the fact that a person has not given evidence, or to the lack of contemporaneous documentation, depends entirely on the context and particular circumstances: Efobi v Royal Mail Group Ltd [2021] UKSC 33; [2021] 1 WLR 3863." (Emphasis added)

35. On the issue of whether the land that comprised Parcel B was or was not accreted land, the judge was confronted with evidence from different land surveyors. They were Hubert Williams, Thomas Ferguson, Leonard Chee-A-Tow, Harold Hing Cheong and Tex Turnquest; Hubert Williams and Thomas Ferguson gave oral evidence. The evidence of the other land surveyors came from documents they created in the ordinary course of business. It must be recalled that in quieting proceedings, a court is not bound by the ordinary rules of evidence. Section 8 of the Act provides:

> **"8. (1) The court in investigating the title may receive and act upon any evidence that is received by the court on a question of title, or any other evidence, whether the evidence is or is not admissible in law, if the evidence satisfies the court of the truth of the facts intended to be established thereby."**

36. In paragraphs 133 to 183 of the judgment, the judge considered and analysed the evidence of the land surveyors. I do not propose to repeat all of the evidence. However, the Minister relied on the evidence of Thomas Ferguson ("Ferguson") to support its claim that Parcel B was Crown Land. The material parts of Ferguson's evidence is as follows:

> **"2. Having inspected the relevant files and records of the Department of Lands & Surveys in relation to the matter herein revealed that the said subject land was overlaid on the plan MP 50 which is reflective of the William Sumner Grant.**
> **3. That a review of the Notice attached to the Affidavit of Vanessa M.R. Hall filed herein on 22 August, 2017 with a plan attached thereto; and served on the Office of the Attorney General was not reflective of the said William Sumner Grant.**

4. **Further, the areas coloured pink on the said plan are not reflective of the Lots described as lots 2, 3, 5, 9 and 10 in the said Notice. Now produced and shown to me marked "T.F.1" is the Affidavit of Vanessa M.R. Hall with Notice and plan attached.**
5. **That in my capacity as Acting Surveyor General of the Commonwealth of the Bahamas a survey was caused to be conducted of the subject land described in the aforementioned Schedule in accordance with the Lands Surveyors Act 1975 and the Lands Surveyors Regulation 1975.**
6. **That our survey team specifically referred to files and recorded plans of Crown Grant K-90 and Crown Grant I-104.**
7. **The said land in Crown Grant K-90 is described as:**

   "Pursuant to a warrant from his Excellency... dated the 27 day of March, 1806 I have caused to be admeasured and laid out unto William Sumner eighty (80) acres of land situate on Rum Cay bounded northwardly by land that is allowed for the Salt Pond and on all other sides vacant land, and hath such shape and marks as are represented on the above Platt, certified the 8th of July, 1806". A copy of the William Sumner Grant K-90 is now produced and shown to me marked "T.F.2"

8. **That the description of the subject land in this action is not consistent with the K-90 Grant.**
9. **That based on the said information, it was imperative for my survey team to visit the said island of Rum Cay. As is the usual practice I sought the approval of the Minister with Responsibility for Crown Lands to do a site visit and was granted this approval in January, 2018.**
10. **That the survey team then conducted surveys and found that there was a 15 acre tract of land which was Crown Land.**
11. **This 15 acre tract of land was not identified on the Plan attached to the said Notice; now produced and shown to me marked "T.F.1" is the Affidavit of Vanessa M.R. Hall with Notice and plan attached.**
12. **That our team traced a total of 96.865 acres of land, of which 80.665 acres are within the said Crown Grant found in plan 65RC now produced and shown to me marked "T.F.3".**
13. **That the team also traced 16.2 acres of Crown Land clearly defined outside the 80 acres perimeter to the west of the said Crown Grant reflected in Plan 64RC now produced and shown to me marked "T.F.4".**
14. **Within the boundary of the Crown Grant established, our team superimposed the boundaries of lots 2, 3, 5, 9 and 10 (the subject matter of this action) from Plan 57 of Rum Cay, recorded at the Department of Lands and Surveys, now produced and shown to me marked "T.F.5" [sic]**
15. **We found lots 5, 9 and 10 to be partially within the boundary of the said Crown Grant and partially within the 16.2 acres of Crown Land. We found Lots 2 and 3 to be within the boundary of the 16.2 Acres of Crown Land- which is on the foreshore. Annexed hereto is Plan 64RC now produced and shown to me marked "T.F.4".**

16. That I have been advised that the Crown has issued a license to the Wahoo Foundation in this matter, and as such, has been exercising every right as the owner over the subject land."

37. The thrust of his evidence is that:

> **"We found lots 5, 9 and 10 to be partially within the boundary of the said Crown Grant and partially within 16.2 acres of Crown Land. We found lots 2 and 5 to be within the boundary of the 16.2 acres of Crown Land –which is on the foreshore."**

38. In a supplemental affidavit, Ferguson further stated:

> **"10. Based on the science of how land [sic] the coastline can be affected is either by accretion, alluvion or erosion. It can be gradual or sudden. Sudden changes to coastal features or Shock can be caused a number of ways and some which apply in the Bahamas can be due to natural disasters (hurricanes, tornadoes, excessive tidal action, earthquakes and tectonic plate activity among others) or man-made interventions (such as reclamation). In analyzing the vegetation, the topography and the way the sediment (sand) traverses the coastline, it is reasonable to conclude that the sand would migrate around the coast of Rum Cay and build up around Sumner Point. The natural flow of the sand would be interrupted by the Marina which was cut and cause [sic] a buildup of sand. The aerial photograph in 1970 clearly indicates a buildup of sedimentary material around Sumner Point as can be seen on the overlay I have submitted. The overlay on the Google Image similarly shows a buildup of the sedimentary material near Sumner Point. The analysis of the vegetation in the aerial photo near the coastline and further inland indicate that it is of similar type and density. The pond near the coast is similar in nature to the inland ponds which indicate that they would have formed similarly and around the same time. <u>This leads me to the conclusion that the land was always there and was not formed by accretion</u>.**
>
> **11. To further support this conclusion that the 15 Acres of Crown Land always existed, the Topographic Map indicates a ridge of ten 10 feet close to the higher hill at Sumner Point. This ten (10') ridge would have acted as a natural barrier to hurricanes and sea swells. The coast of the Bahama natural barrier to hurricanes and sea swells [sic]. The coast of the Bahama Islands has not changed in a significant way from the 1700's [sic] until now. The coast does experience change at slow rates unless there is a shock. Sumner Point has the lower hill at (20') feet elevation while Signal Point to the Northeast of Sumner Point has the highest elevation of eighty (80') feet as shown on the extract of the 1:25,000 Topographic Map compiled by me on March 14, 2019.**
>
> **12. The analysis of a shock was carried out by me and I was unable to locate any meteorological data during the period 1806-1847. However, data was located on hurricanes from the period 1851-2018 (see attached). Despite this comprehensive data, the low-lying islands remain with the same geometry [sic] for the most part. Sea level will continue to be monitored as there are local and**

seasonal variations which affect may [sic] the coastline. The wave action and current are responsible for the migration of the sand around the coast of Rum Cay in a daily cycle. Wind also has the effect of moving sedimentary material on the coast. Hurricanes appear to have an instant impact but did not seem to affect the extremely low lying islands so drastically that in other areas of the Bahamas 15 - 20 acres of land which was hard land (not loamy, sedimentary material) was created. At the physical inspection by me, there was evidence of hard land along the coast at the ten (10') ridge which was similar to the surrounding land not the subject of this action, now produced and shown to me marked "T.F.2"."

13. It is unlikely that the environmental conditions (temperature, pressure, rainfall, prevailing winds, ocean currents) were vastly different between the period 1806-1847 (41 years) and those in 1977 and 2020 (43 years) except for hurricanes. <u>Thus, considering the rate of change of the [sic] unlikely that there was so much erosion to cause the coastline to reflect what is shown in the commutation diagram. Hence, it was likely an error by the draftsman in the placement of the coastline.</u>" (Emphasis added)

39. Ferguson's evidence moves on the assumption that the 16.2 acres that constitutes Parcel B is Crown Land because it was not part of the 1806 Crown Grant to Sumner. Essentially, he argues that it is unlikely that 16.2 acres at Parcel B could have been created by accretion by natural forces.

40. The primary evidence in support of accretion came from Hubert Williams. He said:

"6. On the 11th February, 2019 I was requested by Mr. Timothy Eneas on behalf of the Petitioners to review the available aerial photographs, survey plans and drawings relating to the parcel of land situate in "Signal Point" or "Sumner Point'' in the island of Rum Cay and comprising 80 acres ("the 80 Acres Tract'') for the purpose of opining on the location and features of the 80 Acres Tract in particular its Southwestern boundary as described in the diagram recorded at the Department of Lands and Surveys and identified as Commutation A3-266 ("the Commutation"). The 80 Acres Tract was commuted to William Sumner on the 17th April, 1847 ("the 80 Acres Tract''). A certified copy of the Commutation is exhibited hereto and marked "HW-1" together with a transcribed copy of the original prepared by William Norman Aranha (Crown Lands Officer).

7. As a part of my engagement I was also asked to review and consider (i) a survey plan of the 80 Acres Tract together with an adjoining tract of land comprising 15.43 acres ("the 15.43 Acres Tract' or "Tract B") prepared by Chee-A-Tow & Company Ltd. which said survey is said to have been completed in 1977 and is recorded in the Department and recorded as 11 Rum Cay ("the 1977 Survey") and (ii) a letter from Mr. Leonard V. Chee-A-Tow ("Mr. Chee-A-Tow") to Mr. Tex Turnquest, the Deputy Director of the Department, dated 21st June, 1996. Copies of the 1977 Survey and the said

letter dated 21st June, 1996 are attached hereto and marked exhibits "HW-2" and "HW-3" respectively.

8. I have also been provided with copies of the following letters/documents which are relevant to the location and features of the 80 acres tract and the 15.43 Acres Tract:

(i) Survey Report from Mr. Chee-A-Tow to Anthony Hepburn of Graham Thompson & Co. dated 3rd November, 1977. A copy of the said letter dated 3rd November, 1977 is attached hereto and marked exhibit "HW-4".

(ii) Minute Paper No. 57 dated 26th May, 1994 and prepared by Mr. Tex Turnquest (Valuation Surveyor). A copy of the said letter dated 26th May, 1994 is attached hereto and marked exhibit "HW-5".

(iii) Memorandum to Mr. Tex Turnquest dated 26th May, 1994 from Mr. Dwight Watkins. A copy of the said memo dated 26th May, 1994 is attached hereto and marked exhibit "HW-6".

(iv) Letter dated 22ndAugust, 1996 from Loftus Butler, Surveyor General, to the Department of Legal Affairs. A copy of the said letter dated 2ndAugust, 1996 is attached hereto and marked exhibit "HW-7".

(v) Memorandum dated 22nd November, 1996 from Ian Winder, Assistant Counsel in the Department of Legal Affairs to the Surveyor General, Department of Lands and Surveys. A copy of the said memo dated 22nd November, 1996 is attached hereto and marked exhibit "HW-8".

(vi) Minute Paper No. 6 dated 3rd March, 1999 from Ernest White (Senior Surveyor) to the Acting Surveyor General (R. Brennen). A copy of the said Minute Paper No.6 dated 3rd March, 1999 is attached hereto and marked exhibit "HW-9".

(vii) Letter dated 25th September, 2008 from Mr. Harold Hing-Cheong, Acting Surveyor General, to Michelle Wells. A copy of the said letter dated 25th September, 2008 is attached hereto and marked exhibit "HW-10".

(viii) Memorandum dated 16th August, 2010 from Mr. Audley Greaves of the Office of the Prime Minister to the Director of Lands and Surveys. A copy of the said memo dated 16th August, 2010 is attached hereto and marked exhibit "HW-l1".

9. While working at the Department there were many occasions where I was required to locate and survey property referred to in the records of the Department. In carrying out my duties I would routinely refer to the descriptions in Crown Grants and the plans prepared in connection therewith, together with any related commutations relative to the same when endeavoring to identify and locate property. In my professional experience the descriptions and plans aforesaid were invaluable resources in determining the location of properties and whereas modern instrumentation may at times have demonstrated that there were some errors in the total acreage or the dimensions, the descriptions and plans were generally accurate as to the location and placement of the properties to which they referred.

10. The plan shown at HW-1 shows the location of the 80 Acres Tract commuted to Mr. William Sumner on the 17th April, 1847.The Commutation describes the tract as being bounded "Southwesterly by the Sea". It is noted that a small portion of the Southwestern boundary is bounded by what appears to be a small protrusion or a bluff which is situate outside of the tract. This protrusion or bluff is in my opinion important as it would have contributed to the accumulation of the sand deposits referred to in paragraph 25 below.

11. Based upon the details appearing on the plan and set out in the description below the plan, it is clear that at the time of the preparation of the commutation in 1847 the 80 Acres Tract was bounded by the sea on the majority of the Southwestern boundary.

12. The description and plan in the Commutation are inconsistent with the description in the William Sumner Crown Grant dated 1806 which refers to the 80 Acre Tract as being bounded "Northwardly by land that is allowed for the salt pond and on all other sides by vacant land. I am not able to determine the reason for the inconsistency as I am instructed that no other documents from the period 1806 to 1847 specifically relating to the property have been recovered although the inconsistency may be attributable to an amendment or clarification to the Crown Grant or some other official modification to the boundaries of the 80 Acres Tract which resulted in the 80 Acre [sic] Tract being located as it appears in the Commutation.

13. In this regard I note that the Commutation was signed by J. J. Burnside, Surveyor General of the colony at the time and the plan and the legal description set out in the commutation would have been prepared from field notes and it is my experience in the Department that where land was being located based upon a commuted Crown Grant the plan and the description of the commutation would be used as a starting point in determining the location of the property in question.

The Chee-A-Tow (the 1977 Survey)

14. The 1977 Survey was prepared by Mr. Chee-A-Tow at the instance of Mr. Robert Little. I was well acquainted with Mr. Chee-A-Tow who was considered to be senior surveyor in the country with a wealth of expertise in the field of surveying and who served in the capacity as Senior Surveyor in the Department for many years.

15. The 1977 Survey Shows the 80 Acres Tract and the 15.43 Acres Tract adjourning the Southwestern boundary. In a letter dated 21st June, 1996 to Mr. Tex Turnquest Deputy Director of the Department, Mr. Chee-A-Tow noted that the diagram and description in the Commutation formed the basis of the 1977 Survey and that the total acreage of the tract surveyed comprised 95.805 acres as a consequence of what was described as natural accretion in the area due to prevailing weather conditions over the years.

16. Based upon the plan and the description in the Commutation and the plotting of the 80 Acres Tract as depicted in the 1977 Survey l am of the opinion that Mr. Chee-A-Tow's findings and conclusions are reasonable and correct. The reasonability of his findings and conclusions also appear to have been

accepted by the then Deputy Director of the Department, Mr. H. R. Wason FRICS, who Mr. Chee-A-Tow agreed with his findings prior to the recording of the plan in 1977.

17. It has always been my experience that if the contents of a proposed survey plan were disputed by the officer in the Department responsible for the recording of the same, the plan would not be recorded until either the issues were satisfactorily addressed by the surveyor or the officer was otherwise directed to record the plan pursuant to an order of the Court.

18. Based upon the documentation referred to in paragraph 8 above it is clear that the issue of the location of the 80 Acres Tract was the subject of considerable investigation by the Department during the period 1994 to 2008. In a letter dated 22nd August 1996, Mr. Loftus Butler, the Surveyor General of The Bahamas, informed the Director of Legal Affairs that the Department was of the opinion that the 15.43 Acres Tract was accreted land which formed part of the William Sumner Grant (see exhibit HW-7). In that letter the Surveyor General sought the legal opinion of the Department of Legal Affairs as to whether the Crown had any interest in the accreted land (the 80 Acres Tract and the 15.43 Acres). In the Memorandum from the Office of the Attorney General dated 22nd November, 1996 the Surveyor General was advised that land formed by alluvion or accretion belonged to the owner of the adjoining land (see exhibit HTW-8). The Surveyor General was further advised to satisfy himself that the accretion was not deliberate and that it had in fact taken place. Additionally, by letter dated 25th September, 2008 Mr. Harold Hing-Cheong, the Acting Surveyor General, informed an intended purchaser that the 15.43 Acres Tract was accreted land and formed part of the William Sumner Grant (see exhibit HW-10).

19. I should note that each of Mr. Chee-A-Tow, Mr. H. R. Wason FRICS, and Mr. Harold Hing-Cheong were all Guyanese and had extensive experience in the field of hydrography (the study of the physical features of oceans, seas, coastal areas, lakes and rivers as well as the prediction of their change over time) as a consequence of their work in Guyana associated with Demerara River projects and other tidal issues. For this reason each of them would have been qualified to make determinations relating to the physical features observed near the Southern boundary of the 80 Acres Tract.

20. I also note that in a Memorandum dated 16th August, 2010 from Mr. Audley Greaves of the Office of the Prime Minister he advised the Director of the Department that notwithstanding the determination of the Acting Surveyor General (Harold Hing-Cheon), the view of the Minister Responsible for Lands and Surveys was that the accreted land was owned by the Crown and not by the owner of the adjoining property (See exhibit HW-11). In my review of the attached correspondence relating to this matter, and apart from the noted inconsistency between the descriptions in the Crown Grant and the Commutation, I am not able to discern the reason for the Minister's contrary view but it appears to be inconsistent, to say the least, with the opinions of the persons qualified to make such a determination.

Alluvion and Accretion

21. In the course of my research I was able to obtain a copy of an aerial photograph of Rum Cay taken on the 4th January, 1970 and showing the Signal Point area ("the 1970 Aerial Photograph"). I was also able to locate the 1/10,000 Topographical Map of Rum Cay ("the Topographical Map"). A copy of the 1970 Aerial Photograph and the Topographical Map are attached hereto and marked exhibit "HW-12" and "HW-13" respectively.

22. The 80 Acre Tract and the 15.4 Acres Tract are clearly visible in the 1970 Aerial Photograph and based upon the 1977 Survey, it is notable that the Southwestern boundary in the photograph has changed (from its appearance in the Commutation plan) over the years to include a salt pond and a large sand dune which is situate above the high-water mark. There is no visible evidence in the 1970 Aerial Photograph of development or non-natural/artificial works done to the pond, the surrounding land or foreshore which would contribute or lead to the creation of the pond or the sand dune.

23. Based on my professional experience and using the plan on the Commutation as the starting point for the location of the 80 Acres Tract and the Southwestern boundary; the extent of the obvious changes to that boundary could, in this region, only have reasonably been caused by the processes of 'alluvion' or 'accretion' or possibly a combination of both in cycles.' Alluvion' in this context means the gradual and imperceptible deposit or accumulation of matter on the foreshore and 'accretion' being the gradual and imperceptible receding of the sea.

24. Attached hereto and marked exhibit HW-14 is an aerial photograph of Signal Point taken in or about the year 2013 and provided to me showing the approximate location of the properties the subject matter of the Petition shaded pink. From that photograph it can be readily observed that the area comprising the subject properties is above the high-water mark and is comprised of predominantly sand and, near the inland portions, sandstone. The precise location of the properties the subject matter of these proceedings can be ascertained from the plan filed by the Petitioner in these proceedings and attached hereto and marked exhibit "HW-15".

25. In my opinion and in addition to accretion there is also evidence of alluvion taking place around the land which is likely the cause of the accumulation of the sand deposits forming the large sand dune upon which Lots/Parcels 2 and 3 are situate. This is likely to have been caused by the bluff or protrusion described in paragraph 10 above which is situate near the Southwest corner of the 80 Acre Tract and which operated like a groin to disturb the natural longshore drift resulting in the accumulation of sand in the cove like area. The extent of the accumulation of sand can be clearly seen in the 1970 Aerial Photograph and in my experience, having regard to the size of the 15.43 Acres Tract, its creation would have been the result of gradual and imperceptible deposition of sand over many years.

26. Regarding accretion, the opinions of Mr. Chee-A-Tow, Mr. H. R. Wason FRICS, Mr. Loftus Butler and Mr. Harold Hing-Cheong all support a conclusion that there was accretion taking place in the area of the 80 Acres

Tract and the 15.43 Acres Tract and I have observed nothing in the plans or aerial photographs to contradict or dispute their conclusions.

Conveyances subsequent to the Commutation

27. I have been provided with the following two conveyances in the chain of title relating to the 80 Acres Tract and the 15.43 Acres Tract:

(i) Conveyance dated 11th February, 1954 between Mena Letitia Sumner of the one part and Carl John Heyser Jr. of the other part recorded in Volume P.20 at pages 230 to 232 (the 1954 Conveyance"); and

(i) Conveyance dated 11th June, 1968 between The H & M Corporation Limited of the one part to Gail's Enterprises Limited of the other part recorded in Volume 1309 at pages 560 to 568 ("the 1968 Conveyance"). Copies of the 1954 Conveyance and the 1968 Conveyance are attached hereto and marked exhibits "HW-16" and "HW-17" respectively.

28. The property comprising the 80 acres is described in those conveyances as

"All that piece parcel or tract of land known as "Sumner Point" and also known as "Signal Point" situate to the East of the said settlement of Port Nelson in the said Island of Rum Cay containing eighty (80) acres more or less and bounded as follows on the North by a salt pond on the East by the Sea on the South by the Sea and on West partly [sic] the Sea and partly by Crown Land."

29. From that description it would appear that the orientation of the Northern boundary is the salt pond which boundary is actually the Eastern or Northeastern boundary in the Commutation. Using the orientation in the aforementioned conveyances which places the salt pond in the North (as opposed to the East or Northeast), the 15.43 Acres Tract would be situate due South of the salt pond and it is clear from the description in the conveyances that the vendors in those documents claimed title to the 80 acre property which is bounded "on the North by a salt pond on the East by the Sea on the south by the Sea and on West partly the Sea and partly by Crown Land. [sic] This description encompasses all of the land south of the salt pond including the entire bluff.

30. Consistent with the [sic] Mr. Chee-A-Tow's conclusions that the 80 Acres Tract was bounded by the sea, the descriptions in these conveyances also describe the 80 Acres Tract as being bounded by the sea on the South." (Emphasis added)

41. Both Ferguson and Williams gave viva voce evidence and were cross-examined. The judge considered the conflicting evidence. She said:

"[184] There is a wealth of documentary evidence from as early as 1996 where highly qualified surveyors in the Department of Lands and Surveys had expressed that the 15-acre tract (Parcel B) was accreted land. That was the consensus. It was not until 2008, after the Department made it clear that the 15 acre tract was part of the William Sumner Grant and not Crown land that

the Office of the Prime Minister arrived at a contrary position with really no evidence. This is difficult to digest especially having regard to the fact that the opinion was expressed by several highly qualified surveyors, who had no interest in the land or no axe to grind. By Mr. Ferguson's evidence as to the development of the tract by 1970, he is asking the Court to draw the inference that the tract was always there. However, the period between the William Sumner Grant and 1970 (when the photograph was taken) is nearly 170 years, which is a long period of time within which the changes asserted by the Petitioners could have occurred.

[185] Although Mr. Ferguson's opinion was that the extent of the accretion was unlikely, he agreed with Mr. Williams that the southwest corner of the 80 acre tract acts as a natural grommet, which causes sand to collect. Further, in 1977, when Mr. Chee-A-Tow conducted his survey and wrote his report, he was of the view that the land had been accreted.

[186] Mr. Ferguson also asserted that his team found Lots 5, 9 and 10 partially within the boundary of the said Crown Grant and partially within the 16.2 acres of Crown Land. Lots 2 and 3 were within the boundary of the 16.2 acres of Crown Land – which is on the foreshore.

[187] This bit of evidence demonstrates that accretion is still taking place for the acreage to increase to 16.2 acres from its initial 15 acres. Also, when the Court visited the locus in quo in September 2021, there was evidence of accretion taking place.

[188] For all of these reasons, I prefer the expert evidence of Mr. Williams to that of Mr. Ferguson. On a balance of probabilities, I find the [sic] Parcel B was accreted land formed by natural accretion."

42. In my judgment, and based on the authority of **Bahamasair Holdings Limited**, the judge's finding that Parcel B was accreted land formed by natural accretion could not be said to be plainly wrong.

43. Indeed, it is consistent with the views of the then Surveyor General, Mr. Hing Cheong as expressed in two letters dated 25 September 2008 and 29 December 2009. In the first letter written to Michelle Wells of Montana Holdings he said:

> "**This is to advise you that the parcel of land adjacent to the 80 acres of land which was originally granted to William Sumner is considered to be a part of that land and not Crown property**."

44. In the second letter written to the Office of the Prime Minister, he advised the Prime Minister that:

> **"The strip of land coloured yellow on the sketch forwarded with your memorandum is not crown property. The parcel of land which was granted to William Sumner was originally bounded on the sea. <u>It appears that *accretion has taken place over the years adding sea front area to the property* which accrues to the owners of the land behind.</u>"** (Emphasis added)

45. This was consistent with the views of Leonard Chee-A-Tow as far back as 1996 when in a letter to the Deputy Director of Lands and Surveys, dated 21 June 1996, Chee-A-Tow said:

> **"Dear Mr. Turnquest:**
> **My clients have asked me to confirm with your Department the basis on which my survey plan - Job No. 3814/77 - was produced. A copy of the said plan which is recorded as No. 11, Rum Cay as well as a copy of the commutation page 206 of Book A-3 are enclosed for easy reference.**
> **You will note from the diagram and legal description and the Commutation to William Sumner in 1847 that the tract is bounded on the southwest by the Sea which was the basis of my location of the said tract of land then to be conveyed to Sumner Point Properties Ltd. owned by Mr. Robert Little.**
> **The total acreage was found to be 95.809 acres in 1977 as there was and still is quite a bit of *natural accretion in that area, possibly due to prevailing weather conditions over the years* and thus my survey encompassed all the land to the sea at M. H. W.**
> **Mr. H. R. Wason, FRICS, then Deputy Director, Surveying and Mapping section of your Department checked and agreed with my findings prior to recording of the survey in accordance with the Land Surveyors Act, 1975.**
> **Please therefore confirm that the Crown does not purport to claim any part of the land included in the survey of my client's property in Rum Cay. I would appreciate your early attention to this matter."** (Emphasis added)

46. In a letter dated 22 August 1996 from Loftus Butler, the Surveyor General, to the Director of Legal Affairs he said:

> **"Enclosed herewith are two copies of letters-one from the L.V. Chee-A-Tow Company Limited and one from Attorney Jerome E. Pyfrom on the above mentioned subject.**
> **The question involves 15.143 acres of land and shown on Plan 11 of Rum Cay as parcel "B". In 1977 this plan was approved and recorded at this Department. Both Parcels A, B [sic] were therefore agreed to be the property of Mr. Robert Little.**
> **I have examined the original Grant to William Sumner 80 acres - Grant Book K page 90 dated 8th July 1806 and this south western boundary is described as bounding on vacant land. This parcel of land was later commutated to William Sumner in Commutation Book A3 page 266 on 17 April 1947, and the southwestern boundary is described by the sea. The Grant therefore differs with the commutation and it can only be reasonably concluded that there has been an accretion of land to the southwest of the Sea by 15.143 Acres.**
> **There are other matters at hand concerning the development of the accreted land. You may therefore required [sic] file M.P. 3040 for perusal.**
> **This Department is of the opinion that the 15.143 acres of accreted land now forms part of the William Sumner's Grant. Under the circumstances however the Department now seeks a legal opinion as to whether the crown has any interest in the accreted land containing 15.143 Acres."** (Emphasis added)

47. Moreover, the letter from the Office of The Prime Minister to the Director of Lands & Surveys does not dispute that it is accreted land. That letter stated:

> **"Please be advised that the Minister Responsible for Lands and Surveys has considered the view of the Acting Surveyor General. However, The Minister's view is <u>that land accreted from the sea</u> is Crown owned to which the adjacent grantee does not have Title.**
> **Please be also advised that the Minister Responsible for Lands and Surveys agree to sale [sic] of the 15.43 acres to Sumner Point Properties Ltd at market value.**
> **Please convey the aforementioned decision to Attorney Mr. Craig Roberts of Graham Thompson & Co., Attorney of Record for Sumner Point Properties Ltd. Please also advise if the Department is able to conduct early market valuation of the 15.43 acres. Alternatively, please indicate support but otherwise for its conduct by a private Government approved assessor."** (Emphasis added)

48. Whilst the Minister may not have agreed with the views of the Surveyor General that the acres at Parcel B was not Crown Land, the Minister appears to have accepted the fact that the "land accreted from the sea". The letter does not state the basis for which the Minister held the view that, although the land had accreted from the sea, it was still Crown land. There is no suggestion in that letter that the accretion was man-made thus causing the Minister to believe that it was the property of the Crown.

49. In all the circumstances, I cannot say that the finding of the judge that the land in Parcel B was accreted land formed by natural accretion was plainly wrong. It is consistent with the views previously held by officials in the Department of Lands and Surveys as well as by Mr. Williams and Mr. Chee a Tow. In any event, even though other experts (i.e. land surveyors) had a different view, it was for the judge (and not for the experts) to decide the question of fact as to whether the accreted land was formed by natural accretion. As held in **Volpi**, the judge was at liberty to utilize her common sense and draw, or decline to draw, inferences from the various opinions expressed in the expert evidence of the land surveyors.

50. In the result, it is our view that there is no basis for setting aside the grant of the Certificate of Title to those lots which were partially found on Parcel B on the basis that the land belonged to the Crown.

51. Finally, it is not necessary to deal with the issue of possessory title. The law with respect to possessory title was clearly and correctly stated by the trial judge. She analysed the factual evidence. She said:

> **"In my judgment, William Sumner and his successors in title have occupied the subject property, the subject of this Petition, since the Commutation in 1847. They had peaceful and uninterrupted possession of the property the subject of this petition for over 100 years. No one has objected or challenged**

their possession until shortly before the commencement of these proceedings. They have therefore established the requisite factual possession and animus possidendi for a possessory title."

52. There is no basis for setting aside her findings of fact on the possession of the Petitioners/Respondents and their predecessors in title. Whilst a commutation may or may not be a good root of title, a commutation is cogent evidence that the person was in possession of the land the subject of the commutation. In **Timothy Cox Estates Ltd. v. Harris** [1982] BHS J. No. 35 this Court (differently constituted) noted at paragraph 6: "*By virtue of the Commutation Act of 1847 the fact that the rents due to the Crown were commuted by David Garner Cox would indicate that he was in physical possession of the land at that time*".

53. As the judge pointed out, no one, other than the Minister, has challenged the evidence of possession.

54. In the result, this appeal must fail. It is dismissed and the Appellant is required to pay the costs of the Petitioners/Respondents, which we certify as fit for two counsel.

_____

The Honourable Sir Michael Barnett, P

55. I agree.

_____

The Honourable Mr. Justice Isaacs, JA

56. I also agree.

_____

The Honourable Madam Justice Crane-Scott, JA